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IN THE

Supreme Court of the United States

October Term, 1942.

No. 67.

WADE GARRETT,

Petitioner,

v.

MOORE-McCORMACK COMPANY, INC. and AMERICAN SCANTIC LINE.

REPLY BRIEF ON BEHALF OF PETITIONER ON WRIT OF CERTIORARI.

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REPLY BRIEF ON BEHALF OF PETITIONER ON WRIT OF CERTIORARI.

Respondents have advanced several arguments which require brief reply.

Before considering those matters, we desire to correct an erroneous statement in our brief. On page 5, we stated that, in the course of the trial, respondents attempted to show by a certain X-Ray plate that petitioner had the same fractures in the transverse processes of the back about three years before the accident in question. The erroneous statement was that we thereupon offered the record of the hospital where the earlier X-Ray had been taken. This is not supported by the record and we therefore respectfully offer our apologies and request this Court to disregard it. We note in passing however, that the inferences drawn in this connection remain unaffected by this deletion. The fact remains that the record from which the X-Ray plate was taken, was in court (R. 146a), but respondents did not offer the X-Ray report in evidence; significantly, the envelope from which the plate was taken showed that the findings were negative (R. 181a).

Proceeding now to the consideration of the legal questions raised by respondents, we note first the argument that where the seaman brings his suit in a State Court for injuries sustained on shipboard, he is governed by the common law of the State or forum of his selection. In support of this proposition, respondents rely upon article 3, section 2 of the Constitution, which provides that the judicial power of the United States shall extend to all cases of Admiralty and Maritime jurisdiction, and upon the Act of Congress, June 10, 1922, C. 216, Sec. 2; 28 U. S. C. A. sec. 371. This act vests exclusive jurisdiction in the Federal Courts of all civil causes of Admiralty and Maritime jurisdiction "*sav-*

ing to suitors in all cases the right of a common law remedy where the common law is competent to give it."

It may be noted at the outset that in making this argument, respondents completely reverse their former position in this case. In the course of the argument before the Pennsylvania Supreme Court respondents stated (Appellee's Brief, p. 9):

> "It is conceded that the plaintiff had the right to bring his action in the State Court. And it is further conceded that if the plaintiff had not executed a release it would have been proper to submit his case to the jury to pass upon the question of whether the circumstances of the alleged accident were such as to render the shipowner liable and of the period of time during which the plaintiff was entitled to maintenance and cure. *It is obvious that these questions would have to be determined in accordance with the Maritime Law."* (Emphasis ours)

Respondents now take an entirely different view and repudiate their former position as follows: (Respondents' brief p. 16):

> ". . . as to seamen we have an express direction from the constitution and from Congress through the Judiciary Act, forbidding the several states to apply admiralty rules because jurisdiction is given exclusively to Federal Courts."

An analysis of respondents' own brief clearly discloses the soundness of their first view and the error into which they have now fallen. Respondents brush aside the numerous cases cited by petitioner with patently unsound distinctions and rely upon two cases, neither of which is authority for their present view.

In *Moses Taylor v. Hammons*, 71 U. S. 411, 4 Wall. 411, one of the two cases cited by respondents, a suit *in rem* was

instituted in the State Court under a California State Statute, which provided for actions *in rem* against vessels. This court denied the right of any State to make any law, relating to Maritime proceedings *in rem*, holding that since a *rem* proceeding was statutory, having its origin in the civil law and not in the common law, it did not come within the saving clause of the judiciary act. Nowhere in the opinion does the court state or imply as respondents urge, that the State Court is forbidden to apply the Admiralty law where the common law affords a remedy. In fact this court said quite the opposite and pointed out that the exclusive jurisdiction of the Federal Courts pertained only to those cases where there was no common law remedy, as for example an attachment or *rem* proceeding. This case clearly supports petitioner's view. The case at bar involves a common law remedy in the State court and not a *rem* proceeding. What the respondents have done is to read the judiciary act without any regard for the meaning of the "saving" clause.

Respondents' whole argument is based upon the premise, that it is a remedy at the common law which is saved by the judiciary act rather than a common law remedy. This premise is diametrically opposed to what your Honorable Court has many times construed the "saving" clause to mean. Respondents state (brief 12) that the meaning of the saving clause is clearly demonstrated in *Belden v. Chase* (1893) 150 U. S. 674, 37 L. ed. 1218, 14 Sup. Ct. Rep. 264. We respectfully note that nowhere in the opinion of that case is the "saving" clause referred to, nor does the court attempt to construe that clause or to distinguish between a remedy at the common law and a common law remedy. *Belden v. Chase* holds that where the cause is brought in admiralty the comparative negligence rule is applicable, but if the suit it brought at common law then the common

law rule of contributory negligence applies. This is a clear example of the error caused by failing to recognize the distinction between a common law remedy and a remedy at the common law. The distinction was most clearly set forth by this court in *Chelentis v. Luckenbach*, 247 U. S. 372, 62 L. ed. 1171, which case squarely meets the issue here involved and construes the "saving" clause in the judiciary act referred to by respondents. It leaves no doubt that *Belden v. Chase* is not the law today. Respondents attempt to brush aside the effect of the *Chelentis* case by stating that the construction of the "saving" clause was dictum and should not be considered as authority. A brief recital of the facts proves the contrary. The *Chelentis* case was an action at law for personal injuries sustained by a seaman by reason of the alleged improvident order of the first assistant engineer. The plaintiff claimed the right to recover full indemnity, relying upon two acts of Congress: (1) the Judiciary Act of 1789, 1 Stat. at L. 76, 77, Chapt. 20, giving the district courts exclusive cognizance of causes of admiralty and maritime jurisdiction, "saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it"; and (2) the La Follette Act (March 4, 1915, C. 153, 38 Stat. at L. 1164, 1185), which provided "That in any suit to recover damages for any injury sustained on board vessel or in its service seamen having command shall not be held to be fellow servants with those under their authority." It was contended that the effect of these acts was, first, that where a seaman proceeds by an action at law, the rights and liabilities of the parties are governed by common law principles; and second, that the affirmative defense of injury by fellow servant, so far as it concerned seamen having command, was abolished. This court held that the Judiciary Act saved a common law

remedy, and not a remedy in the common law, as a consequence of which the rights of the seaman must be determined by the maritime law to the exclusion of the common law, and without regard to the court wherein the right is asserted. As to the rights under the maritime law, the court found that liability for indemnity could only arise from an unseaworthy condition of the vessel and there was no such liability resulting from the negligence of the master or any fellow member of the crew. The La Follette Act merely provided that a seaman in command shall not be considered a fellow servant. It did not, said the court, impose upon shipowners the same measure of liability for injuries to seamen, as the common law prescribes for shore employees. In this view the court found that the La Follette Act added nothing to the liability of the owner for indemnity and since the common law rule was not available in a maritime cause of action there could be no recovery for the negligence of a seaman in command even though the right was asserted in a common law court. It is thus obvious that the opinion of the court relating to the "saving" clause was in no sense dictum but absolutely essential to the decision of the case. In construing the "saving" clause the court said:

> "The distinction between rights and remedies is fundamental. A right is a well-founded or acknowledged claim; a remedy is the means employed to enforce a right or redress an injury. Bouvier's Law Dict. Plainly, we think, under the saving clause a right sanctioned by the maritime law may be enforced through any appropriate remedy recognized at common law; but we find nothing therein which reveals an intention to give the complaining party an election to determine whether the defendant's liability shall be measured by common-law standards rather than those of the mari-

time law. Under the circumstances here presented, *without regard to the court where he might ask relief, petitioner's rights were those recognized by the law of the sea.*" (L. Ed. pp. 1176, 1177) (Italics ours)

Reasoning from the foregoing principles this court leaves no doubt that *Belden v. Chase* is no longer the law in regard to the application of the comparative negligence rule where a maritime cause of action is concerned (L. Ed. pp. 1174-1175):

> " 'The contract of a seaman is maritime and has written into it those peculiar features of the maritime law that were considered in the case of The Osceola, 189 U. S. 158, 47 L. ed. 760, 23 Sup. Ct. Rep. 483; and although, because of these peculiarities, such contracts are almost invariably litigated in admiralty courts, *still the contract must be the same in every court, maritime or common law.* The only difference between a proceeding in one court or the other would be that the remedy would be regulated by the lex fori. If a seaman who had been locked up or put in irons for disobedience of orders were to sue the master for damages in a court of common law, he could not recover like a shore servant, such as a cook or chauffeur, who had received the same treatment. *So a seaman bringing suit in a common-law court for personal injuries could recover, even if guilty of contributory negligence, although a shore servant suing in the same court could not;*' " (Emphasis supplied)

It is submitted that the *Chelentis* case completely destroys respondents' argument on this point. Respondents have argued (Brief 14) that the significance of the *Chelentis* case is that the Act of 1915 could not extend in application beyond suits brought in admiralty. It is apparent that they have completely overlooked the basic principles involved in that case.

The leading text writers likewise consider the holding in *Belden v. Chase* as having been long since superseded. *Sprague on Divided Damages* 1928, 6 N. Y. U. L. Rev. 15, states:

> ". . . the rule of divided damage . . . is a part of the right connected with every maritime tort and not a mere procedural remedy, dependent upon the forum, . . . since (Belden v. Chase) the principles of that admiralty law have been more clearly defined and established and Carlisle Packing Co. v. Sandanger, 1922, 259 U. S. 255, 42 S. Ct. 475, 66 L. Ed. 927; Chelentis v. Luckenbach S. S. Co., 1918, 247 U. S. 372, 38 S. Ct. 501, 62 L. Ed. 1171; Southern Pac. Co. v. Jensen, 1917, 244 U. S. 205, 37 S. Ct. 524, 61 L. Ed. 1086; Knickerbocker Ice Co. v. Stewart, 1920, 253 U. S. 149, 40 S. Ct. 438, 64 L. Ed. 834 have been decided. The principles underlying these cases are contrary to the decision in Belden v. Chase and it is suggested, have modified it."

This view is quoted with approval in *Robinson on Admiralty* (P. 862) and in *Benedict on Admiralty*, Sixth Edition, Vol. 1, P. 54, 55.

Moreover this court has in numerous decisions applied the rule which we urge, and which is opposed to the rule of *Belden v. Chase*. Some of the leading and most recent cases on this point are: *The Arizona v. Anelich*, 298 U. S. 110, 80 L. Ed. 1075; *Beadle v. Spencer*, 298 U. S. 124, 80 L. Ed. 1082.

Respondents undertake likewise to distinguish the decision of this court in the case of *Carlisle Packing Co. v. Sandanger*, 259 U. S. 255, 66 L. Ed. 927, 42 Sup. Ct. 475. Here again it is contended that it was unnecessary for the Supreme Court to base its decision on the Admiralty Law, as the Common Law was competent to give the same remedy; that therefore the decision can have no more force than

dicta, and that it is in conflict with the Constitution and the Judiciary Act (R. Brief 15). We submit that in this case as in the others, respondents fail to properly analyze the facts or the law. There the seaman instituted an action in the State Court of Washington against the shipowner, contending that his employer was negligent in filling a can with gasoline which ordinarily contained coal oil and was so labeled, and which was used to start fires in the cook stove. Plaintiff, without knowledge of the substitution, poured the gasoline upon the firewood and when he applied a match an explosion resulted and he was badly burned. The trial court held that the basis of the action was negligence and instructed the jury according to the common law rules in respect thereto, stating that if the seaman was contributorily negligent, he could not recover. A verdict for the plaintiff was affirmed by the Supreme Court of Washington and certiorari was duly granted. This court held that the trial court committed error in applying the common law rule of contributory negligence; that the general maritime law should have been the applicable law to the exclusion of the common law rule. However, since the error was committed in favor of the defendant, the defendant had no ground for complaint. The court made it very clear that the maritime rule of comparative negligence was the proper rule to the exclusion of the common law rule, notwithstanding the suit had been brought in the State Court. Said the Court:

> "The general rules of the maritime law apply whether the proceeding be instituted in an admiralty or common-law court. Chelentis v. Luckenbach S. S. Co. supra; Knickerbocker Ice Co. v. Stewart, 253 U. S. 149, 159, 64 L. Ed. 834, 838, 11 A. L. R. 1145, 40 Sup. Ct. Rep. 438.

"Here the trial court did not instruct the jury in consonance with these rules, and, by failing so to do, fell into error.

"But mere error, without more, is not enough to upset the judgment, if the record discloses that no injury could have resulted therefrom. West v. Camden, 135 U. S. 507, 521, 34 L. ed. 254, 258, 10 Sup. Ct. Rep. 838." (L. Ed. p. 930)

We respectfully submit that the respondents have placed upon the Constitution and the Judiciary Act, an interpretation which finds no support in the authorities and which is in direct conflict with numerous decisions of this court. To permit the State law to be applied to a maritime cause of action could only result in the destruction of the uniform operation of the maritime law, since a suitor, if respondents' contention were the law, could have the benefit of any one of a number of different laws, depending upon his choice of the forum. This court has always most vigorously resisted any attempt to destroy the uniform operation of the maritime law.

Petitioner has set forth in his original brief, certain of his own testimony showing that the release was unfairly obtained and should be set aside. We desire to point out here certain other evidence from respondents' own witness which is sufficient in itself to invalidate the release.

Bearing in mind the duty which the shipowner owes to his seamen, comparable to the relationship of trustee and cestui que trust, and requiring full disclosure and fair dealing, the testimony of claim agent Suessmuth clearly discloses that respondents did not meet the obligation imposed on them by law. Suessmuth had before him the report showing petitioner's injury due to the falling ventilator, and that he was put on light duty before the vessel reached

the first European port (R. 121a). He admitted further that he had the report of Dr. Nielson the company doctor who examined petitioner immediately Garrett came ashore and found an injury to the hand and foot and advised a rest for three days. Confining ourselves to those injuries, it developed that both of these injuries were fractures instead of bruises. This was confirmed by X-Ray in the hospital in Gdynia, Poland, shortly thereafter (R. pp. 283a, 284a). It was also confirmed by the X-Ray of the U. S. Marine Hospital in New York (R. 273a). The claim agent had all of this information before him when he made the settlement (R. 120a). Instead of making a full disclosure and attempting to work out the settlement on some reasonable basis, he completely misrepresented the facts as follows: (R. 106a)

> "Q. How did you arrive at this figure with him?
> A. I didn't arrive at anything, I just told him he didn't have a claim against the company."

This is exactly the sort of conduct against which the courts have sought to protect the seamen. It shows clearly the lack of fairness and candor necessary to the validity of any seaman's release.

It is to be noted that the Trial Court in its opinion en banc stated that the evidence was sufficient under the maritime law to invalidate the release had the suit been brought in the admiralty instead of in the State Court. We have already argued that the law should be the same in both courts.

Respondents argue that the most this court can accomplish is a new trial in view of the statement of the Pennsylvania Sup. Ct. that, had it concluded that the judgment should be reversed on petitioner's appeal; they would not have directed judgment to be entered on the verdict but

would have reinstated the motion for a new trial. (Respondents' Brief, p. 28)

We respectfully submit that this court can do more than merely accomplish a new trial. It requires no argument to say that this court may direct that judgment may be entered on the jury's verdict in favor of petitioner. The motion for a new trial was carefully considered by the court of Common Pleas sitting en banc and was denied as follows: (R. 320a)

> "The trial judge left the matter to the jury. In a fair and impartial charge, the evidence for the plaintiff and defendants was properly analyzed. . . . Therefore, the motion of defendants for a new trial should be refused."

A new trial must be substantially the same as the first trial. To send the case back for retrial when both parties have had their day in Court can accomplish no useful purpose. We respectfully urge that this Court reverse the judgment of the court below and direct that judgment be entered on the verdict.

Respectfully submitted,

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